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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-185

MORTON P. ROME and MARJORIE T. ROME, Trustees under a Trust Agreement,

Petitioners,

v.

INDIAN HEAD INC. *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PLAINTIFFS-RESPONDENTS IN OPPOSITION

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Respondents, plaintiffs below in three class actions[1] brought by owners of Convertible Debentures, Common Stock and Warrants of Indian Head Inc., to prevent a so-called freeze out going private merger, respectfully pray that this Court deny petitioners'[2] writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit, which unanimously affirmed from the bench, without opinion, the District Court's judgment approving the

[1] *Edw. Brucker, et al.* v. *Thyssen-Bornemisza Europe N.V., et al.; William B. Weinberger* v. *Richard J. Powers, et al.; Shamrock Corporation, et al.* v. *Indian Head, Inc. et al.*

[2] Who own 25 out of 14,291 convertible debentures and no common stock or warrants.

$32 million settlement of this litigation and rejecting petitioners' common law claim to an absolute contract right to convert their Debentures into Common Stock. The settlement has been consummated and most of the members of each class—Debenture, Common Stock and Warrants—have claimed and received their distributions.

There Are No Questions for Review

The essence of the petition is in its last paragraph (p. 30) where petitioners ask that the entire settlement be vacated, and that this Court remand the case to the District Court:

> "with such appropriate directions as will prohibit alteration or impairment of the conversion rights into common stock of all Debentures owned by petitioners and other owners thereof without the affirmative consent of each Debenture owner affected."

Such relief, which would require this Court to review the contract—raises at most a common law, not a federal question. Moreover, it is the antithesis of the position petitioners maintained before the District Court, when they said:

> "I would also wish to make clear, not only to the Court, but to all counsel present that as counsel for the objecting parties here, we are not seeking to intrude into the Court's affirmation of the settlement if that is the conclusion that your Honor reaches insofar as the common stock is concerned or the warrants are concerned, nor indeed do we seek to prevent those holders of convertible debentures who assent to that which is being proposed here from indeed assenting." (App. 244a)[3]

[3] References are to the Appendix below.

Petitioners cannot convert their about face into a question for review by this Court.

Counter-Statement of the Case

The petition has its roots in the $32 million all cash settlement of three class action cases which posed the first Rule 10b-5 freeze out going private merger claim in the Southern District of New York after the Second Circuit Court of Appeals decision in *Green* v. *Santa Fe Industries, Inc.,* 533 F.2d 1283 (2d Cir. 1976), *rev'd,*——U.S.——, 51 L. Ed. 2d 480 (1977).

In capsule form, the story of this litigation falls into four parts:

1. The Take-Over.

Indian Head Inc., a diversified $300,000,000 American conglomerate with Common Stock and Convertible Debentures listed on the New York Stock Exchange and Warrants to Purchase Common Stock (then exercisable at $25) listed on the American Stock Exchange, was the target in 1973 and 1974, of two successful $27 per share Common Stock tender offers by Thyssen-Bornemisza Europe, N.V. (TBE) (App. 358a) which acquired a total of 90.6% of the Common Stock (App. 358a). Both the Common Stock and Debentures were then promptly delisted from the New York Stock Exchange, the market price for each fell sharply, and thereafter they were traded on the over-the-counter market at depressed prices (App. 104a), as were the Warrants on the American Stock Exchange. (App. 104a)

2. The Class Action Litigation.

After TBE acquired control of Indian Head three class action suits followed in quick succession:

First, on December 31, 1974, came plaintiffs-respondents Brucker and Kaplan ("Brucker"), record owners (as

trustees) of 11 Debentures, on behalf of all Debenture owners (App. 7a), followed three weeks later by plaintiff-respondent Weinberger, a former Debenture owner, likewise for all Debenture owners (App. 359a), and then in April, 1975 by plaintiff-appellee Warrant owner Shamrock Corporation ("Shamrock") on behalf of all Warrant owners (App. 359a).

All three actions alleged that the tender offers resulted in the delisting of the Debentures and Common Stock, destroying the market values of those securities, and of the Warrants which were exercisable into Common Stock. In the *Brucker* and *Weinberger* actions, the Debenture owners (whose Debentures were registered) complained that no notice of the tender offers was sent to them, thereby depriving them of the right to receive $701, if they converted, compared to the $650 market price for their Debentures during the 1974 tender offer. (App. 104a).

3. The Proposed Merger.

On February 12, 1976—eighteen months after the takeover—TBE announced (App. 359a) it proposed a short form Delaware all cash merger of Indian Head into a TBE subsidiary, offering $30 a share for the Common Stock ($3 more than the tender offers); $779 for each Debenture (which was $78 more than if it had been converted during the tenders); and *Nothing* for the Warrants, which in 1976 entitled the owners to purchase common stock for $30 a share (App. 359a).

Eight days after the proposed merger was announced, plaintiff-respondent Brucker filed an amended complaint and a motion for a preliminary injunction on behalf of the owners of Warrants and Common Stock, as well as Debentures, to enjoin the merger on the grounds that it had no business purpose; that the Indian Head minority investors

were all being frozen out at unfair prices; and that the merger was also a ruse to avoid redeeming the Debentures for $1,033 (App. 39a). Plaintiff-respondent Shamrock then amended its complaint, on behalf of Common Stock as well as Warrant owners and demanded rescission of the tender offers. (App. 92a).

On the return date of Brucker's motion to enjoin the proposed merger, TBE withdrew it and agreed to negotiate a settlement with all classes. (App. 360a).

4. The Settlement.

A. On July 28, 1976, a settlement of all three class actions was ultimately concluded (App. 360a). It provided for the cash merger of Indian Head into a TBE affiliate and for cash payments which were 40% more for the Common Stock than TBE's merger proposal, nearly double for the Debentures and infinitely more for the Warrants, namely: $32 per share for the Common Stock; $851.65 for each Debenture (with accrued interest), and $4 (or $2.50 depending on date of ownership) for the Warrants. In addition, the Debenture owners had the option to retain them with the right to convert at any time thereafter into $831 cash (a conversion ratio equivalent to $32 per share for the Common Stock). (App. 361a).

B. Debenture, Warrant and Common Stock classes were certified by the District Court, with Brucker representative of all classes, and his counsel lead counsel for all; Weinberger as representative of the Debenture classes and his counsel co-counsel for them; and Shamrock representative of the Warrant classes and its counsel co-counsel for them. (App. 151a).

C. After 60 days' prior mail notice, and national publication, two days of hearings on the fairness of the settle-

ment were held by the District Court (App. 353a). Petitioners filed a 51-page Brief, and appeared at both hearings contending that the Debenture Indenture gave them the absolute right to convert into Common Stock (of Indian Head's successor). They insisted that the class settlement could not deprive them of that "right" without their written consent. (App. 193a).

D. The Court below approved the settlement, analyzed petitioners' objections in detail, rejected them and denied them a stay (App. 352a, 426a). The merger was consummated on November 30, 1976, and the more than $32,000,000 in settlement payments to all three classes commenced thereafter, most of which has been claimed by and paid to them.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Introductory.

Petitioners own no Common Stock and no Warrants, just 25 out of 14,291 Debentures. Their only claim is that under the Debenture Indenture, Indian Head could not merge for cash without petitioners' written consent. They then take that unalloyed common law contract claim, wrap it in the Constitution and ask that the entire settlement be vacated.

This is the third court in which petitioners have tried to camouflage their common law contract claim with a forest of federal "questions". But the forest is a mirage, here as below. There are no Rule 23 questions because they could only arise

> *if*
>
> petitioners have "several contract rights pursuant to the terms of their debentures which provided that

> there would be no alteration or impairment of their rights to convert into common stock without their consent." (Petition, p. 4).

The District Court found no such contract rights.

The Court of Appeals found none.

There are none.

And any question as to the existence of contract rights arises wholly under the Indian Head Indenture, and not under the U.S. Constitution or the Federal Rules of Civil Procedure.

Without contract rights, petitioners' attempt to discredit the adequacy of the class representation is as gratuitous as it is specious. They concoct a custom made class all for themselves: debenture owners who claim the right to consent in writing to any merger for cash, although there are none other than petitioners. Then they attack Brucker and Weinberger as inadequate representatives for choosing to settle, rather than fight.

But it is petitioners, not the representatives, who are inadequate for creating a claim so shallow that it staggers credulity.

II. The District Court Properly Exercised its Discretion in Approving the Settlement.

The District Court's review of petitioners' objections was so painstaking and well reasoned that it was swiftly affirmed by the Court of Appeals and warrants similar short shrift by this Court, as the following excerpts demonstrate:

1. The District Court correctly found petitioners do not have a right to convert into common stock.

"Many of the Romes' objections arise out of an assertion that the Indenture prevents any class action settlement involving debenture owners, as the Court can in no way alter ". . . the creditors [debenture holders] . . . separate and several contract rights . . ." without the individual written consent of each holder. They claim that the settlement can only bind those holders who affirmatively opt in and cannot bind those who do not respond. They also claim that the Indenture agreement prevents a forced conversion into money in the event of a merger, and requires either that Indian Head redeem the debentures or that Indian Head respect the absolute right to convert into common stock. (Pet. App. A 15).

* * *

"First, we agree that § 5.06 should control here because it contains a detailed and specific provision as to what the debenture holders' rights are in a merger while § 12.02 deals with their rights in a general context.

"In the case of a merger, § 5.06 requires that the supplemental Indenture contain the right to convert into whatever form of property the shareholders receive in the merger. Thus the debenture holders have never had an absolute right to convert into Indian Head stock in a merger, but only the right to convert into whatever form of "property" the shareholders would receive. Defendants argue that cash is "property" within the meaning of § 5.06. We agree that cash is within the scope of the term "property" as used in § 5.06, and note that it has been so interpreted in *Broenen v. Beaunit,* 440 F. 2d 1244 (7th Cir. 1970). Here, as a result of the proposed merger, the Indian Head shareholders will receive only cash for their

stock. Thus the provision in the settlement agreement allowing for conversion of the debentures into cash only is proper under § 5.06 because this is all the shareholders are receiving. In addition, § 5.06 does not require the individual written consent of each debenture holder when conversion rights are altered pursuant to a merger, so we conclude that the settlement abridges no rights of the debenture holders and can properly bind all debenture holders who do not opt out." (Pet. App. A 16-17).

2. The District Court correctly found that the three actions below were properly maintainable as class actions.

"First they object to the designation of the suits as class actions for purposes of settlement only, on the grounds that this is unauthorized by Rule 23 and is violative of the provisions of the Manual for Complex Litigation. . . . The Second Circuit has stated in *Grinnell, supra,* that the Manual recommendations 'were not meant to be intractable rules,' and that the major concern of the Manual may be satisfied where, as here, the settlement provides 'for notice of a hearing and an opportunity to challenge the fairness or any other aspect of the proposed settlement,' *Grinnell,* 495 F. 2d at 466. In addition, *Grinnell* stated that the Manual's objectives may be satisfied where, as here, the settlement was not negotiated in the early stages of the dispute, but rather after the parties had engaged in considerable litigation and were able to assess the risks of success, and where, as here, there were not different counsel vying to be class representatives before the settlement agreement was reached and publicized. . . . Therefore, the designation of these actions as class actions for purposes of settlement only was proper in this case.

"The objectors also claim that there is an abuse of the use of Rule 23. . . . The abuse to which the objectors point is the proposed settlement, which they contend will abridge the substantive conversion rights of the debenture holders. We do not agree that the settlement abridges any substantive rights of the debenture holders. . . . Further, we find that the Rule 23 procedures were properly followed. Full notice was given to all members of the classes, and their rights to appear and object, or to opt out, were fully explained. Thus the Rule 23 procedures have protected the substantive rights of the individual debenture holders. (Pet. App. A13-14).

"Since we find that no substantive rights of the debenture holders are abridged by this settlement, this dispenses with the following objectors' claims: 1) that representation of the class was not adequate. . . . 2) that their constitutional rights under the Fifth and Fourteenth Amendments and Article One, Section 10 were violated . . . . 3) that the class is not sufficiently numerous, since not a sufficient number assented in writing. . . ." (Pet. App. A17).

3. The District Court correctly found the settlement fair.

"In the instant case, there are complicated questions of law on both the issues of liability and damages. . . . One of the primary unresolved legal questions involves the interpretation and application of *Marshel, supra, Green, supra,*[4] *and Merit* v. *Libby, McNeill and Libby,* 533 F. 2d 1310 (2d Cir. 1976) to the attempted short-form merger in this case, particularly in light of the fact that the Indian Head merger is distinguishable on its facts from each of

[4] *Green,* which was heavily relied on by plaintiffs-respondents seeking to stay the merger and by petitioners in objecting to the settlement, was reversed by this Court, —— U.S. ——, 51 L. Ed. 2d 480 (1977).

the above cases. Thus the Court does not agree with the objectors' assertion that a liability is clear with respect to issues arising from the short-form merger. This case also presents complex legal and factual questions on a variety of other issues, among them: whether or not the 1973 and 1974 tender offers were false and misleading in failing to disclose that TBE would merge Indian Head into an affiliate; whether or not under *Van Gemert* v. *Boeing,* 520 F. 2d 1373 (2d Cir.), *cert. den.,* 423 U.S. 947 (1975), Indian Head was obligated to send notice of the tender offers to the registered debentures owners. (Pet. App. A12).

". . . The Court also has noted the favorable reaction of the classes to the settlement. In light of these factors, we find the settlement fair and reasonable." (Pet. App. A13).

III. Petitioners' Contract Claim is at Common Law and There is Neither a Federal Question Nor a Conflict Between the Circuits.

The District Judge found—and the Court of Appeals unanimously affirmed—that the Indian Head Indenture permitted a merger for cash without the Debenture owners' consent. Those findings involved common law questions of contract interpretation, in the context of this settlement, and nothing else. To the same effect, the 7th Circuit in *Broenen* v. *Beaunit Corporation,* 440 F.2d 1244, 1249 (1970) affirmed the dismissal of a complaint brought by a convertible debenture owner to enforce such an alleged right under an Indenture virtually identical to Indian Head's.[5]

[5] And only this past August 17, 1977, U.S. District Judge Robert Hill reached the same conclusion in an unreported Judgment and Conclusions of Law, *Broad* v. *Rockwell International Corp.,* CA3-74-437D (N. D. Texas, Dallas Div.).

Petitioners offer not a word, nor a case, to support their claim. Yet the illusion of such a common law contract right permeates each of the "questions" they invent in order to create their petition. The first two "questions" (Petition, p. 3, 4) assume, without explanation, that petitioners are not members of the Debenture class because their alleged common law contract right made them "non-parties". They then define "non-parties" in their third "question", as follows:

> "where such non-party convertible debenture owners had several contract rights pursuant to the terms of their debentures which provided that there would be no alteration or impairment of their rights to convert into common stock without their consent." (Petition, p. 4).

Thus petitioners apparently contend that in a cash merger settlement, a Convertible Debenture owner who claims a common law contract right to convert into Common Stock, is not a member of the Debenture class. They cite no authority for that proposition, much less any conflict between the Circuits, nor any decision of this Court. There are none.

Absent authority, bereft of a Federal issue, petitioners claim calamity. They argue that the decisions below are:

> "a serious threat to the entire national market for convertible debentures, because it opens the door to a method by which a practical destruction of the entire underlying basis for convertible debenture purchases may be effected." (Petition, p. 3).

But there is no evidence—not here, not in the District Court, not before the Court of Appeals—to support such an absurd conclusion. On the contrary, this Court can

take judicial notice that the American free enterprise system, and its free securities markets, would be seriously threatened if every convertible debenture owner had a veto over mergers for cash, even though his indenture permits it.

To petitioners complaint, there is an answer: object or opt-out. They made their choice and are bound by it.

IV. The Judgment Below Cannot be Set Aside as to Classes Which Petitioners Concede They Do Not Represent.

Petitioners do not claim to speak for the Warrant or Common Stock classes, or even for the overwhelming majority of the Debenture class which accepted the settlement. Thus it would be grossly inequitable for this Court even to consider taking a case where the petitioner has so marginal an interest.

This Court has held unequivocally that in class actions "a litigant must be a member of the class he or she seeks to represent at the time the class action is certified by the district court." *Sosna* v. *Iowa,* 419 U.S. 393, 403 (1974). Petitioners fail that test as to the Common Stock and Warrant classes. Moreover, it is hornbook law that a litigant:

> "has standing to seek redress for injuries done to him, but may not seek redress for injuries done to others." *Laird* v. *Tatum,* 408 U.S. 1, 14 (1972) quoting from *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 166 (1972).

Petitioners have not asserted that the Common Stock and Warrant classes were injured by the settlement or even that the settlement terms were unfair to them. On the con-

trary, as noted at the outset, petitioners expressly represented to the District Court that:

> They had no interest in the Common Stock settlement,
>
> They had no interest in the Warrant settlement, and that,
>
> Their only interest is in just a portion of the Debenture class who did not approve the settlement.

In justice, petitioners' concern is *de minimis,* compared to the nearly 32 million dollars which the other class members have at stake, and which might have to be surrendered if the writ were granted.

V. Petitioners' Constitutional Attack on the Rule 23 Opt-Out Provision and Their Demand for Specific Findings are Made Here for the First Time and May Not be Reviewed.

Petitioners make two statements here for the first time:

1. "the affirmative act of opting out . . . is unconstitutional (Pet. p. 19).
2. this Court should require in this case

   "specific findings of fact and Conclusions of law" (Pet. p. 17).

Neither argument was ever made before the District Court or the Court of Appeals. Petitioners do so here, for the first time, in an apparent attempt to bootstrap their common law contract claim onto a federal question custom made for the purpose. Both contentions, like all the rest, are the common law contract claim in another disguise. But we submit they must fall *ab initio* because they were never raised or considered below. *Duignan* v. *United States,* 274 U.S. 195, 200 (1926); *Lawn* v. *United States,* 355 U.S. 339, 362 n. 16 (1958); See also, *Youakim* v. *Miller,* 425 U.S. 231 (1976).

CONCLUSION

This appeal from a whole judgment, which deals with a part—and a part of a part at that—is puzzling to begin with. It becomes bewildering because it is apparent that the result Petitioners seek would mean:

> that no American corporation could consummate a cash merger without the written consent of each owner of Convertible Debentures, even where his contract permits such a merger.

It would mean:

> that this Court should determine that Congress, in writing the Securities Exchange Act of 1934 (whose 10b-5 jurisdiction is invoked here), and the legislatures of Delaware and New York, in adopting their corporate statutes, intended such a result.

And it would mean:

> that this Court must rewrite not only those federal and state statutes, but the common law and Federal Rule 23 as well.

The enormity of that proposition pales beside its twin: that the District Court must be reversed for failing to exercise the discretion which would have been required to make such landmark law, on its own.

Such a fantastic result would also require this Court to repeal that part of Rule 23 which permits settlements of class action litigation such as this, or to declare Rule 23 unconstitutional because it binds those who assert, but cannot prove, per se violations of law. For Petitioners are saying to this Court without ever citing any authority—that no convertible debenture owners (here or elsewhere) could ever be certified as a class, and their claims in this or any litigation could never be settled, without the express written consent of each and every one.

We submit that to state that proposition is to deny it!

On the Facts, on the Law and as a Matter of Public and Judicial Policy, the Petition Should be Denied.

Dated: New York, New York
September 19, 1977

Respectfully submitted,

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